Nos. 83-1065 and 83-1240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE COUNTY OF ONEIDA, NEW YORK, *et al.*,
Petitioners,
v.
THE ONEIDA INDIAN NATION OF NEW YORK, *et al.*,
Respondents.

THE STATE OF NEW YORK,
Petitioner,
v.
THE ONEIDA INDIAN NATION OF NEW YORK, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., NATIONAL CONGRESS OF AMERICAN INDIANS, SENECA NATION OF INDIANS OF NEW YORK AND SEMINOLE TRIBE OF FLORIDA IN SUPPORT OF RESPONDENTS

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BRIEF *AMICI CURIAE* OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., NATIONAL CONGRESS OF AMERICAN INDIANS, SENECA NATION OF INDIANS OF NEW YORK AND SEMINOLE TRIBE OF FLORIDA IN SUPPORT OF RESPONDENTS

Pursuant to Rule 36.2, the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016; the National Congress of American

Indians, a corporation having its principal office at 804 D Street, N.E., Washington, D.C. 20002; the Seneca Nation of Indians of New York, having its principal office at P.O. Box 231, Salamanca, New York 14779; and the Seminole Tribe of Florida, having its principal office at 6073 Stirling Road, Hollywood, Florida 33024; file the attached brief *amici curiae* in support of the respondents in the above-captioned case. Petitioners, the Counties of Oneida and Madison, New York and the State of New York, and Respondents, the Oneida Indian Nation, et al., have consented in writing to the filing of this brief.

INTEREST OF *AMICI CURIAE*

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nation-wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *Solem* v. *Bartlett*, 104 S.Ct. 1161 (1984), *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (1968), and *Warren Trading Post Co.* v. *Arizona State Tax Commission*, 380 U.S. 685 (1965).

The National Congress of American Indians ("NCAI") was founded in 1944 and is the oldest and largest national organization of Indian governments and individuals in the United States, with a membership of federally recognized tribes representing a combined population of over 750,000 American Indian and Alaska Native people. NCAI and its membership have a profound concern with the ability of Indian tribes to protect their property rights. Such property rights are critical to the survival of Indian tribes as distinct cultural entities, and to the economic development desperately needed to break the cycle of poverty which has plagued Indian people for generations.

The Seneca Nation of Indians of New York and the Seminole Tribe of Florida are federally recognized Indian tribes which exercise powers of self-government. The Seneca Nation and Seminole Tribe have engaged in litigation under 25 U.S.C. § 177 in defense of their property rights. Were the Court to rule that Indian tribes lack the power to protect their property rights under § 177, these Indian governments would be deprived of one of the few remaining means by which they may defend their reservation lands from illegal takings.

This case presents grave questions of: (1) the continuing ability of Indian tribal governments to sue in defense of property rights protected by 25 U.S.C. § 177; and (2) the standard by which the courts determine whether any given act of Congress extinguishes tribal land title.

In order to facilitate the Court's consideration of the extremely broad legal and policy implications of this case, *amici* have chosen to address the two issues noted above in a manner somewhat different than the respondents. Specifically, the attached brief is offered to assist the Court in recognizing that: (1) the Court previously has entertained actions by both the United States and Indian tribes predicated on the Trade and Intercourse Acts, and Congress has manifested its understanding that such suits are appropriate; (2) congressional ratification of illegal takings of Indian land can be accomplished only by legislation which expresses a plain and unambiguous

congressional intent to do so; and (3) a decision by this Court that tribes have no right to sue for violations of the Trade and Intercourse Acts will deprive tribes throughout the nation of the ability currently to defend their property against unauthorized expropriation.

SUMMARY OF ARGUMENT

Indian tribes generally have capacity to maintain suit for the protection of their property, a status under law which has existed from the very inception of this nation and which was acknowledged as early as 1790 by President Washington. This Court and the lower federal courts also have recognized the specific right of the United States and Indian tribes, jointly or separately, to sue for redress of violations of the Trade and Intercourse Acts. Such suits not only address ancient wrongs, but serve more particularly to protect reservation lands currently from unauthorized invasions or illegal expropriations.

In accordance with applicable canons of statutory construction, Indian tribes have possessed an implied right of action under all the Trade and Intercourse Acts. In addition to the language and legislative histories of these Acts, Congress clearly manifested its intent to sanction private suits by Indian tribes through an 1822 amendment to the 1802 Act assigning the burden of proof in trials concerning property rights "in which Indians shall be a party. . . ." Indian tribes were the intended beneficiaries of the Trade and Intercourse Acts, and suits by tribes to redress violations of the Act obviously further the legislative purpose.

Congressional ratification of illegal takings of Indian land may not be implied absent a showing of a plain and unambiguous legislative intent to achieve that result. Such an intent does not exist in this case.

ARGUMENT

I. This Court and Congress both have recognized that the Trade and Intercourse Acts authorize suits by the United States and Indian tribes to preserve or redeem interests in land.

A. This Court already has determined that Indian tribes may sue to preserve or redeem tribal property rights.

The seminal case regarding the right of Indian tribes to sue in order to protect their real property interests is *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919). In that case, the Pueblo sued to enjoin the Secretary of the Interior from disposing of lands in which the Pueblo claimed a property interest. The United States defended on the ground that the Pueblo was not a legal entity and lacked capacity to sue. This Court rejected the argument, noting first that the Pueblo's status as an Indian government[1] alone was sufficient to give it the capacity to sue:

> During the Spanish, as also the Mexican, dominion, it enjoyed a large measure of local self-government and was recognized as having capacity to acquire and hold lands and other property. *With much reason this might be regarded as enabling and entitling it to become a suitor for the purpose of enforcing or defending its property interests.*

249 U.S. at 112. (Emphasis added.)

The Court ultimately relied upon a territorial statute in holding that the Pueblo could maintain its suit. *Id.* The *Lane* case, however, is memorable for the precedential views expressed therein regarding the general capacity

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[1] The rule that Indian pueblos have essentially the same status as Indian tribes was established in *United States* v. *Sandoval*, 231 U.S. 28 (1913).

of Indian tribes to sue in defense of their property. Thus, in *Creek Nation* v. *United States*, 318 U.S. 629, 640 (1943), the Court observed, citing *Lane* and other cases, that the Creek Nation and Seminole Nation "had . . . as a general legal right . . . the power to bring actions on their own behalf." Similarly, in *Poafpybitty* v. *Skelly Oil Company*, 390 U.S. 365 (1968), the Court quoted with approval a lower court statement that the past decisions of this Court "clearly recognized the rights of . . . Indian tribes or pueblos to maintain actions with respect to their lands. . . ." *Id.* at 371, quoting *Choctaw & Chickasaw Nations* v. *Seitz*, 193 F.2d 456, 459 (10th Cir. 1951).

Petitioners do not dispute tribal capacity to sue, but argue instead that judicial recognition of such capacity is a recent phenomenon. Thus, they posit, Congress could not have intended to allow actions by tribes to redeem rights granted under the 1793 Act. Act of March 1, 1793, c. 19, § 8, 1 Stat. 329, 330. What the petitioners fail to mention is that questions about tribal capacity to sue arose towards the beginning of the Twentieth Century, not the Nineteenth, and, when the issue finally was raised, it was resolved in the tribes' favor in no uncertain terms: "Of their capacity to maintain such a suit, we entertain no doubt." *Lane*, *supra*, 249 U.S. at 113.

In the landmark case of *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), this Court decided that an Indian tribe is a "state,"[2] but not a "foreign state"

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[2] Just as the Pueblo of Santa Rosa under Spanish and Mexican law, the Cherokee Nation under American law "enjoyed a large measure of local self-government and was recognized as having capacity to acquire and hold lands and other property." *Cf. Lane* v. *Pueblo of Santa Rosa*, *supra*, 249 U.S. at 112. Having the capacity to treat with the United States for the purpose of acquiring, ceding and selling real property, the Cherokee Nation must have had the capacity to sue for the protection of those rights. *Id.*

within the meaning of Article III of the Constitution and, therefore, not capable of bringing an original petition against one of the United States in the Supreme Court. *Id.* at 15-16. In so holding, the Court not only did not question the Cherokee Nation's capacity to sue, but impliedly affirmed that right, saying: "If it be true that the Cherokee Nation have rights, *this is not the tribunal in which those rights are to be asserted.*" *Id.* at 20 (emphasis added). Thus, in the Court's view, the issue was not whether the Cherokee Nation could sue, but, rather, in what court it might do so.[3] Petitioners' reliance upon *Cherokee Nation* for the proposition that Indian tribes long were regarded as lacking capacity to sue, therefore, is wholly misplaced.[4] *See also Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U.S. 641 (1890); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902).

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[3] Significantly, one of the claims of the Cherokee Nation was that the Georgia laws violated the Trade and Intercourse Act of 1802. *Cherokee Nation*, *supra*, 30 U.S. at 7.

[4] Petitioners' reliance on *Jaeger* v. *United States*, 27 Ct. Cl. 278 (1892) also is misplaced. The *Jaeger* court suggested in *dicta* that *Cherokee Nation* and other cases discussing the wardship status of Indian tribes yielded a general lack of capacity to sue. The *Jaeger* court simply was mistaken, perhaps because Indian tribes expressly were barred from filing suit in the Court of Claims—a statutory bar, incidentally, which need not have been created if the tribes had no capacity to sue. *See* § 9 of the Act of March 3, 1863, c. 92, 12 Stat. 765, 767; § 1 of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505. Later decisions of this Court make clear that the tribes' status as wards of the federal government imposes no disability in terms of their right to sue to protect their property rights. *United States* v. *Candelaria*, 271 U.S. 432 (1926); *Lane* v. *Pueblo of Santa Rosa*, *supra*. That few cases involving tribes were brought in federal courts reflects the fact that they were courts of limited jurisdiction, not a lack of tribal capacity.

B. This Court and lower federal courts have recognized implicitly the validity and justiciability of suits brought to redeem tribal property rights guaranteed under the Trade and Intercourse Acts.

In *United States* v. *Candelaria*, 271 U.S. 432 (1926), the United States filed suit to quiet title against certain persons who were asserting what was alleged to be a false claim to certain lands belonging to the Pueblo of Laguna by virtue of a Spanish grant. "The suit was brought on the theory that these Indians are wards of the United States and that it therefore has authority and is under a duty to protect them in the ownership and enjoyment of their lands." *Id.* at 437. Although the source of the defendants' claim of title to the lands is not made clear in the opinion, two prior court decrees were asserted by the defendants as a bar to the suit. The United States had not participated in the prior litigation.

The key issue in *Candelaria* was whether the previous judgments passed good title to the defendants. This Court ruled that they did not because they were not rendered in compliance with the Trade and Intercourse Acts. Specifically, after noting the existence of both the 1834 Act and an 1851 statute extending that Act's coverage to tribes in New Mexico (271 U.S. at 441, citing Act of June 30, 1834, c. 161, § 12, 4 Stat. 729, 730, 25 U.S.C. § 177), the Court said:

> A judgment or decree which operates directly or indirectly to transfer the lands from the Indians, where the United States has not authorized or appeared in the suit, infringes that restriction. The United States has an interest in maintaining and enforcing the restriction which cannot be affected by such a judgment or decree.

Candelaria, supra, 271 U.S. at 443-44. Thus, in a case in which, like the case at bar, a Trade and Intercourse Act right underlay the claim, the United States was

found capable of filing suit to redeem the property of an Indian tribe.

The authority of the United States to file suit under the 1834 Act never has been deemed exclusive. Accordingly, in *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Tuscarora Nation intervened in a Federal Power Commission proceeding in which an application for a project license by the Power Authority of the State of New York was under consideration. The Tuscaroras urged that the Power Authority lacked the ability to condemn tribal land, since such a condemnation would violate the Trade and Intercourse Act. *Id.* at 118-19. The Court ruled that, as a federal licensee, the Power Authority stood on the same footing as the United States, and because the Trade and Intercourse Act did not apply to takings of Indian land by the United States, neither did it apply to the taking by the Power Authority. At no point, however, did the Court question the Tuscarora Nation's ability to raise the Trade and Intercourse Act in defense of its property rights.

Representative cases in the lower federal courts also show the validity of tribal suits under the Trade and Intercourse Acts as well as the versatility, vitality and continued utility of the 1834 Act, even outside the context of the eastern Indian land claims.[5] Thus, in *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976), both a tribe and the United States successfully sued for relief from an alleged easement granted in violation of § 177. Moreover, in *Assiniboine and Sioux Tribes* v. *Calvert Exploration Co.*, 223 F. Supp.

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[5] *Cf. Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315 (1927) (An improvident contract between a tribe and an attorney found void under § 177); *The New York Indians*, 72 U.S. (5 Wall.) 761, 771 (1867) (Title acquired pursuant to a tax sale for taxes illegally assessed on tribal property can be voided under the Trade and Intercourse Act).

909 (D. Mont. 1963), *rev'd sub nom.*, *Yoder* v. *Assiniboine and Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964), the Tribes alone employed § 177 as a basis for a suit to prevent tribal lands from being pooled with the lands of others to form a "spacing unit" for oil and gas development. In *Seneca Nation* v. *New York*, 397 F. Supp. 685 (W.D. N.Y. 1975), the tribe used § 177 to block a wrongful taking of reservation lands for highway purposes.[6]

In short, for the Court to rule that the Oneida Nation does not possess a right to sue under the 1793 Act would be to reverse longstanding judicial precedents, including prior decisions of this Court, and to strip from Indian tribes today a key weapon in the very limited arsenal they retain to protect their lands from invasion and abuse.

C. Congress has manifested an understanding that the 1834 Trade and Intercourse Act and its predecessors authorize suits by tribes to protect their property rights and, because the 1793 Act is substantively identical to the other statutes, causes of action which exist under the 1834 Act necessarily are proper under the 1793 Act.

The cases discussed above which were founded upon the Trade and Intercourse Act, as well as those upholding the right of tribes to sue to protect and redeem their property interests, all arose after the 1793 Act had expired and had been replaced by later legislation. Of par-

[6] The courts are open even to non-Indians to make claims under the Trade and Intercourse Act. Thus, in *Marsh* v. *Brooks*, 49 U.S. 223, 233 (1850), the Court remarked "That an action in ejectment could be maintained on an Indian right to occupancy and use, is not open to question." To say that an act passed to "prevent unfair, improvident or improper dispositions by Indians of land owned or possessed by them," *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960), may be relied upon in court by non-Indians, but not by the Indians for whose protection the statute was passed, is nonsensical.

ticular importance among these successor statutes is, of course, the provision of the 1834 Act, c. 161, § 12, 4 Stat. 730, which now is codified at 25 U.S.C. § 177. Section 8 of the 1793 Act is identical in its substantive aspects to § 12 of the 1834 Act, as are the pertinent provisions of the Acts of 1790, 1796, 1799 and 1802.[7] In short, in terms of whether their language forms the basis for a tribal cause of action, all the Trade and Intercourse Acts are indistinguishable.

Moreover, an 1822 amendment to the 1802 Act (Act of May 6, 1822, c. 58, § 4, 3 Stat. 682, 683) strongly suggests that all the former Acts were intended to authorize actions by Indians for the protection of their property interests. That amendment provided:

> [I]n all trials about the right of property, in which Indians shall be a party on one side and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.[8]

If the 1822 Act had contained a provision specifically authorizing suits by Indians to protect their rights, a possible argument could be made that this amendment author-

[7] Compare Act of July 22, 1790, c. 33, § 4, 1 Stat. 137, 138; Act of March 1, 1793, c. 19, § 8, 1 Stat. 329, 330; Act of May 19, 1796, c. 30, § 12, 1 Stat. 469, 472; Act of March 3, 1799, c. 46, § 12, 1 Stat. 743, 746; Act of March 30, 1802, c. 13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, c. 161, § 12, 4 Stat. 729, 730.

[8] The amendment clearly contemplates suits in which the Indian parties are the plaintiffs. If a white person filed suit against an Indian, as the plaintiff, the white person would bear the burden of proof even in the absence of the 1822 amendment. Thus, the amendment must have been intended to apply to suits brought by Indian plaintiffs against non-Indian defendants, lest it be rendered a redundancy. Indeed, Indian tribes could not be named defendants in a title dispute because of their sovereign immunity. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978).

ized such actions where the Acts of 1790, 1793, 1796, 1799 and 1802 did not. No such provision exists, however. The only provisions of the Acts which conceivably could give rise to "trials about the right of property" between an Indian and a non-Indian are the counterparts of § 12 of the 1834 Act. Those sections, being identical in substance to Section 8 of the 1793 Act, must have the same effect of giving rise to a cause of action. In other words, rather than creating a cause of action which had not existed previously, the 1822 amendment to the 1802 Act merely created a new rule regarding the burden of proof in a cause of action which had existed since passage of the first Trade and Intercourse Act in 1790. Thus, Congress long ago made clear its understanding that Indians have capacity to sue under the Trade and Intercourse Acts.

That understanding continues through modern times. As recently as 1966, for example, Congress enacted legislation for the primary purpose of removing the $10,000 jurisdictional limitation of 28 U.S.C. § 1331(a) in suits involving Indian tribes and raising a federal question. Pub. L. 89-635, § 1, 80 Stat. 880 (1966), codified at 28 U.S.C. § 1362. In considering that legislation, the House Judiciary Committee expressed particular concern about the decision in *Yoder* v. *Assiniboine and Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964). *See* H. Rep. 2040, 89th Cong., 2d Sess. 2-3 (1966).

In *Yoder*, the Tribes had filed suit to enjoin the enforcement of a State order requiring that lands owned by the tribes be pooled with lands owned by another to form a "spacing unit" for the drilling of an oil and gas well. The Tribes sued on the theory, *inter alia*, that the State order "constituted an alienation of tribal property in violation of 25 U.S.C. § 177. . . ." *Assiniboine and Sioux Tribes* v. *Calvert Exploration Co.*, 223 F. Supp. 909, 912 (D. Mont. 1963). The Court of Appeals, however, held that the federal courts lacked jurisdiction over the matter because of the Tribes' failure to establish the $10,000 minimum. *Yoder* v. *Assiniboine and Sioux Tribes*, *supra*, 339 F.2d at 364. In eliminating that rule, Congress made plain its awareness and approval of suits by tribes to vindicate property rights under the Trade and Intercourse Acts.

Another indication of Congress' continuing belief in the tribes' right to sue is found in 28 U.S.C. § 2415. In 1982, Congress made the statute of limitations on claims for money damages brought by the United States also applicable to Indian tribes. Two important points arise from § 2415. First, the statute clearly recognizes the right of Indian tribes to sue in defense of their property rights. Second, the statute expressly exempts from its coverage actions "to establish the title to, or right to possession of, real or personal property." § 2415(c). Thus, Congress both recognized tribal capacity to sue for possession of property and refused to limit the time for bringing such actions. Congress did so fully aware of the land claims by tribes then and still pending in the courts.

Finally, the recent spate of legislation settling various tribal land claims under the Trade and Intercourse Acts reflects Congress' current understanding that such suits are proper.[9] Although Congress undoubtedly did not intend to suggest its views on the merits of any of these claims, the acts reflect at least a congressional belief that the tribal causes of action, in the abstract, were sound.

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[9] The settlement acts passed thus far are: Rhode Island Indian Claims Settlement Act, Pub. L. 95-395, 92 Stat. 813 (1978), codified at 25 U.S.C. §§ 1701-1716; Maine Indian Claims Settlement Act, Pub. L. 96-420, 94 Stat. 1785 (1980), codified at 25 U.S.C. §§ 1721-1735; Florida Indian Land Claims Settlement Act, Pub. L. 97-399, 96 Stat. 2012 (1982), codified at 25 U.S.C. §§ 1741-1749; and Mashantucket Pequot Indian Claims Settlement Act, Pub. L. 98-134, 97 Stat. 851 (1983), codified at 25 U.S.C. §§ 1751-1760.

The legislative histories of these statutes give no indication that Congress entertained any doubt as to the theoretical validity of tribal claims under the Trade and Intercourse Acts.

In summary, this Court on several occasions has taken cognizance of tribal claims arising under the Trade and Intercourse Act of 1834. The 1834 Act being identical to its predecessors in all pertinent respects, the same result must obtain with regard to the prior acts. Because Indian tribes always have been recognized as having capacity to sue in defense of their property rights, and because the tribes are the intended beneficiaries of the Acts, they necessarily are able to sue for violations of the Acts. (*See* Point II, *infra.*) This result is consistent with the understanding and intent of the Congress when the laws were enacted and of Congress presently.

II. The Oneida Nation and other Indian tribes have an implied right of action under the 1793 Trade and Intercourse Act and successor statutes.

A. The declaratory language of the 1793 Act and its legislative history, analyzed in light of the law of that time, demonstrate a plain intent on the part of Congress to recognize a right of action for Indian tribes.

In determining whether a federal statute gives rise to a cause of action for a private party, the intent of Congress governs. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981). The statutory language, of course, is critical. Section 8 of the 1793 Act provided that "no purchase or grant of lands . . . from any Indians or nation or tribe of Indians . . . shall be of any validity in law or equity. . ." unless made in compliance with the Act. 1 Stat. 330. This language, read in light of the prevailing rules of law existing at the time of its

enactment,[10] clearly was intended to recognize and confer a right of action in and to Indian tribes for violations of the Act. More specifically, three aspects of the contemporary legal context within which the 1793 Act was adopted combine to erase all doubt as to the intent of Congress: (1) the law of Indian title; (2) the law regarding remedies for breaches of rights; and (3) the law regarding tribal capacity to sue.

Tribal property rights unquestionably were accorded legal validity and effect under American law from the earliest days of the nation. Thus, in *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the Court observed that, at the time of their discovery by the Europeans, Indian tribes "were admitted to be the rightful occupants of the soil, *with a legal as well as just claim to retain possession of it. . . .*" *Id.* at 574 (emphasis added). The only defect in Indian title was that "their power to dispose of the soil at their own will, to whomsoever they pleased, was denied. . . ." *Id.* These rules of law predated the Constitution, and the 1793 Act merely codified the rules which existed at common law. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 678 (1974).

The Indian right of occupancy was not a naked right lacking means of enforcement. "That an action in ejectment could be maintained on an Indian right to occupancy and use, is not open to question. This is the result of the decision in *Johnson* v. *M'Intosh*. . . ." *Marsh* v. *Brooks*, 49 U.S. 223, 232 (1850). No other rule could be said to exist. Except where a remedy was afforded by the mere act of the parties or by mere operation of law, the common law held that "where there is a legal

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[10] This Court previously has recognized the significance of the contemporary legal context under which a statute is enacted. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378 (1982).

right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." III *Blackstone Commentaries* 23 (1st ed. 1768).

The rule that a right could not exist without remedy applied to rights recognized or created by statute, particularly the simpler statutes of that simpler time:

> "When federal statutes were less comprehensive, the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. . . . Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule.

Merrill Lynch, Pierce, Fenner & Smith v. *Curran, supra,* 456 U.S. at 374-75. *And see Texas & Pacific Railway Co.* v. *Rigsby,* 241 U.S. 33 (1916). Indian tribes clearly were the intended beneficiaries of the 1793 Act, *see* discussion below, and the courts, therefore, would imply a remedy for invasions of the statutory right.[11]

Finally, all three branches of government in the early Nineteenth Century shared a belief that tribes were

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[11] The courts did so on numerous occasions under the 1834 Act, the operative provision of which is identical in substance to § 8 of the 1793 Act. *See* discussion, *supra,* at 9-10. Thus, in *United States* v. *Boylan,* 265 F. 165 (2d Cir. 1920), the United States sued on behalf of the Oneidas to set aside a conveyance and partition judgment under the 1834 Act. Several similar suits have been sanctioned by this Court and lower federal courts. *See United States* v. *Candelaria, supra; United States* v. *Colvard,* 89 F.2d 312 (4th Cir. 1937); *United States* v. *7,405.3 Acres of Land,* 97 F.2d 417 (4th Cir. 1938); *McCarty* v. *Hollis,* 120 F.2d 540 (10th Cir. 1941); *United States* v. *Forness,* 125 F.2d 928 (2d Cir.), *cert. denied sub nom., City of Salamanca* v. *United States,* 316 U.S. 694 (1942); *United States* v. *City of Salamanca,* 27 F. Supp. 541 (W.D.N.Y. 1939).

capable suitors. The executive branch so believed, as can be seen in President Washington's speech to the Seneca Nation in 1790: "Here, then, is the security for the remainder of your lands. . . . [T]he federal courts will be open to you for redress. . . ." I *American State Papers, Indian Affairs* 139 (1834). Congress concurred in this view, as may be seen in the Act of May 6, 1822, *supra,* apportioning the burden of proof in "trials about the right of property in which Indians shall be a party on one side and white persons on the other. . . ." *See* discussion, *supra,* at 11-12. This Court never doubted the right of Indian tribes to sue to protect their interests. *See* discussion, *supra,* at 6-7, concerning the 1831 case of *Cherokee Nation* v. *Georgia.*

Certainly by the time Congress considered the 1834 Act, it was aware that Indian tribes were assumed to possess legal capacity to sue. Had it not concurred in this assumption, Congress could and undoubtedly would have expressed its disagreement by altering the operative provisions of the Trade and Intercourse Act. By reenacting the provisions of prior acts without material amendment, Congress indicated its acceptance of the status quo and its intent that tribes would continue to be able to maintain suits.

The statutory language plainly speaks to the existence of a private right of action. By declaring void conveyances made in violation of the Act, Congress must have intended that tribes have "the customary legal incident" of that declaration—a right of action. *Cf., Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 19 (1979). This is particularly true in light of this Court's rule of construction that ambiguities in statutes enacted for the benefit of Indians must be resolved in their favor. *E.g., Ramah Navajo School Board* v. *Bureau of Revenue,* 458 U.S. 832, 838 (1982); *see also* cases cited *infra,* n.15.

Another major Indian land law has been construed on many occasions to provide a cause of action where none is granted expressly. The General Allotment Act of 1887, c. 119, § 5, 24 Stat. 389, 25 U.S.C. § 348, provides that conveyances of Indian allotments prior to the expiration of the trust period "shall be void and of no effect." Although no right of action is authorized expressly, this Court and others often have recognized actions under the General Allotment Act and similar statutes. Many such actions have been brought by the United States, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413 (1912); *Mullen* v. *United States*, 224 U.S. 448 (1912); *Watson* v. *United States*, 263 F. 700 (8th Cir. 1920); but other suits were brought by the Indian allottees themselves. *E.g.*, *Poafpybitty* v. *Skelly Oil Co.*, *supra*; *cf.*, *Marchie Tiger* v. *Western Investment Co.*, 221 U.S. 286 (1911).

Recognition of a tribal right of action under the 1793 Act, therefore, is consistent with the statutory language and legislative history, the prevailing law as of that date, and judicial construction of similar statutes passed for the benefit of Indians.

B. Indian tribes were the intended beneficiaries of the Trade and Intercourse Acts, and suits by tribes to redress violations of the Acts further the legislative purpose.

In determining whether a statute gives rise to a cause of action, a key inquiry is whether the plaintiff is " 'one of the class for whose *especial* benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff?" *Cort* v. *Ash*, 422 U.S. 66, 78 (1975) (citations omitted). In this case, the answer to this inquiry clearly must be in the affirmative. As the court below observed, "the language and purpose of the 1793 Act are unequivocal in their purpose to protect the Indians." *Oneida Indian Nation* v. *County of Oneida*,

719 F.2d 525, 533 (2d Cir. 1983). *See, e.g., Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664 (1979).

Petitioners attempt to escape this result by arguing that the sole purpose of the Act was to ensure the orderly advance of the frontier by preventing uprisings by the Indians. (Counties' Br. at 24; State's Br. at 21, n.) To be sure, the ultimate goal of all federal policy during this era was the advancement of the frontier and the preservation of peace. F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834* (1962) at 3. The petitioners' argument, however, fails to comprehend that the Trade and Intercourse Acts furthered these general policy goals by giving effect to the particular goal of protecting Indians in their property rights. "The intercourse acts were thus restrictive and prohibitory in nature—aimed largely at restraining the actions of the whites and *providing justice to the Indians as the means of preventing hostility.*" F. Prucha, *id.* (emphasis added). Thus, the Oneida Nation is part "of the class for whose *especial* benefit the statute was enacted. . . ." *Cort* v. *Ash*, *supra*, at 78. The Trade and Intercourse Acts "create[d] a federal right in favor of the plaintiff", *id.*, and all other tribes, for the purpose of protecting their property rights, so that the overall goal of American policy—orderly advancement of the frontier—would be furthered.

Another relevant inquiry is whether implying a private right of action is consistent with the legislative purpose. *Cort* v. *Ash*, *supra*, at 78. As the court below noted, "the purposes of the 1793 Trade and Intercourse Act are best served by the implication of a private right of action." 719 F.2d at 536. That conclusion seems self-evident. Quite obviously, private actions by Indians further the Act's purpose of protecting Indian property rights.

The Counties present a fatuous argument to the effect that removal of trespassers by the military better served the cause of peace on the frontier than did private civil litigation. (Counties' Br. at 21-23.) That the cause of peace is better served by military action than the civility and solemnity of the courtroom is a proposition unworthy of consideration.[12]

C. Because Indian property rights are the exclusive domain of federal law in which state law is without effect, inference of a cause of action based solely on federal law is most appropriate.

Indian property rights clearly are the exclusive domain of federal law. As this Court observed in *Oneida Indian Nation* v. *County of Oneida*, *supra*, "Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law." 414 U.S. at 667. Thus, a cause of action under the Trade and Intercourse Act clearly is not one

> traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. . . .

Cort v. *Ash*, *supra*, 422 U.S. at 78. Indeed, the property rights of tribes are so clearly the domain of federal law as to demand recognition of a cause of action for Indian tribes to protect those rights.

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[12] The Counties also argue that the "numerous express remedies" contained in the 1793 Act (Counties' Br. at 23) were sufficient to serve the Act's purpose. In fact, only two remedies are provided for expressly: criminal fines and imprisonment. The reference to "numerous" remedies for the violations of provisions of the Act unrelated to Indian land is an attempt to distract the attention of the Court. Moreover, the 1790 Act contained no express remedy for unauthorized conveyances of Indian land. Thus, unless a private action is implied, Congress had created a right without remedy—the bane of the law.

III. The rule that ratification of a treaty extinguishing Indian title may not be implied in the absence of an expression of plain and unambiguous congressional intent rests on settled doctrines of statutory construction that are of fundamental importance to the protection of Indian property rights.

The Court of Appeals, applying the seminal standard articulated in *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), held that any implied ratification of the 1795 New York-Oneida treaty could be based only upon a "plain and unambiguous" expression of intent by Congress. 719 F.2d at 539. Petitioner Counties have urged rejection of that test and have proposed the following tortured language to replace it:[13]

> [T]here need only be explicit recognition by the federal government of the transaction in issue in a manner that reveals the implicit approval thereof.[14]

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[13] In arguing that it has shown "plain and unambiguous congressional intent" for a subsequent ratification of the 1795 New York-Oneida transaction, the State tacitly has acknowledged the correctness of the "plain and unambiguous" standard. *See* State's Br. at 36.

[14] Counties' Br. at 41. This proposed test is derived from language in the Court of Claims' decision in *Seneca Nation* v. *United States*, 173 Ct. Cl. 912 (1965). The court in *Seneca Nation* failed to mention *Santa Fe Pacific* and, instead, articulated a new test based on "explicit recognition and implicit ratification," *Seneca Nation*, *supra*, at 915. That formulation has not been followed by any other court.

The relevant statute in *Seneca Nation*, Act of January 5, 1927, c. 22, 44 Stat. 932 (1927), applied New York State hunting and fishing laws to the Seneca reservations, with a proviso that "this act shall be inapplicable to lands formerly in the Oil Spring Reservation and heretofore acquired by the State of New York in condemnation proceedings." Although the statute thus reveals a congressional awareness that a land transaction had occurred, it reveals no understanding on Congress' part that the transaction lacked validity under the Trade and Intercourse Act of 1834 or that Congress' action would extinguish the Senecas' title. This language, therefore, falls far short of the "plain and unambiguous" standard. To extinguish Indian title, Congress must be aware, at least, that

The Counties expand even this vague rubric by arguing that "ratification need not be explicit to be effective" (Counties' Br. at 41), and further suggest that "the intent of the government" to ratify can be gleaned from four "factors"—

> (a) the operative language of the statute or treaty, (b) legislative history, (c) the surrounding circumstances, and (d) the historical exercise of state or tribal jurisdiction over the territory.

Counties' Br. at 41.

The Counties' four factors are derived from cases involving acts of Congress opening portions of Indian reservations to white settlement and the problem of whether such actions were intended to diminish the reservations by disestablishing the opened areas. *See, e.g., Solem* v. *Bartlett*, 104 S.Ct. 1161 (1984); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 603 (1977); *DeCouteau* v. *District County Court*, 420 U.S. 425, 442 (1975). In these "disestablishment" cases, the issue presented always involves jurisdiction, not land ownership. The court below correctly understood that subsequent ratification is a form of extinguishment of Indian title and rejected the factors proposed by the Counties. *See* 719 F.2d at 539. "The question of whether title to Indian land has been extinguished is separate from the question of disestablishment." *Idaho* v. *Andrus*, 720 F.2d 1461, 1464 (9th Cir. 1983). In short, the Counties rely for their ratification test upon wholly inapposite cases.

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it may be doing so. The *Seneca Nation* case, then, clearly was wrongly decided, and stands as a monument to the mischief occasioned by applying any standard short of *Santa Fe's* "plain and ambiguous" requirement.

In any event, the court in *Seneca Nation* expressly cautioned that a claim that the transaction was inequitable might change its reasoning. 173 Ct. Cl. at 915-16. The Oneidas make such a claim in this case and *Seneca Nation*, therefore, is inapplicable.

The Counties' argument also ignores the basic principle that ambiguous Indian treaty or statutory language must be construed in favor of the Indians.[15] In essence, these petitioners assert that evidence of the *"government's"* intent to ratify an otherwise invalid treaty of extinguishment can be gleaned from unconnected sources without any clear showing that *Congress* itself intended to ratify the questioned treaty. The standard proposed by the Counties sweeps aside well-settled precedent to the contrary, *e.g., United States* v. *Santa Fe Pacific Railroad Co., supra*, and, more particularly, the unique trust relationship between the United States and Indian tribes. *See, e.g., Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942). The danger of their proposal is made clear when it is considered that the rule of statutory construction followed by the court below is but one aspect of the broader principle that Indian title, whether by occupancy or treaty, cannot be extinguished, diminished, abrogated, or taken by subsequent repeal or ratification without a showing of plain and unambiguous congressional intent to do so. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *United States* v. *Santa Fe Pacific Railroad Co., supra.*

The courts have applied the same essential standard to all cases in which congressional action is argued to have eliminated an Indian property right. The party disputing the Indian property right must demonstrate that Congress clearly intended to eliminate that right. In *Menominee Tribe* v. *United States, supra*, for example, the Court rejected an argument that Congress implicitly repealed treaty hunting and fishing rights in passing the Menominee Termination Act for the "intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Id.* at 413. Similarly, in *Washington* v.

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[15] *See, e.g., Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976); *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); Note, *The Canons of Indian Treaty and Statutory Construction: A Proposal For Codification*, 17 U. Mich. J.L. Ref. —— (1984).

Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979), the Court refused to find that a United States-Canadian Convention dividing salmon catches implicitly abrogated Indian treaty fishing rights. "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . ." *Id.* at 690.[16]

The Counties and the State (*see* n.13, *supra*) fail to meet the "plain and unambiguous" standard and, indeed, to meet even the Counties' own vague test. No statutory language or legislative history exists in this case which shows congressional awareness of the 1795 treaty.[17] As

[16] *See also Antoine* v. *Washington*, 420 U.S. 194, 206 (1974) (ratifying legislation exempted Indian hunting rights from state regulation, for it would be "impermissible in the absence of explicit congressional expression to construe the implementing Acts as [preserving nothing that the Indians would not have had without the legislation]"); *Klamath Indian Tribe* v. *Oregon Dept. of Fish and Wildlife*, 729 F.2d 609 (9th Cir. 1984) (holding that Congress did not clearly intend to abrogate hunting and fishing rights on ceded land); *Confederated Salish & Kootenai Tribes* v. *Namen*, 665 F.2d 951, 955 (9th Cir. 1982) (holding that congressional intent to terminate reservation status was not clearly shown); *Plains Electric Generation and Transmission Cooperative, Inc.* v. *Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976) (preserving Indian lands by finding that Congress clearly intended to repeal a statute permitting condemnation of Pueblo lands without the consent of the Pueblos or the Secretary of the Interior); *New Mexico* v. *Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976) ("Any intent of Congress to relinquish its jurisdiction and control over the lands and water rights of the Pueblos must be express. It may not be implied from a tortuous construction. . . .").

[17] The Counties insist that the phrases "in the last purchase from them" in the 1798 Treaty and "other lands heretofore ceded" in the 1802 Treaty are "explicit evidence that the federal government deemed [the 1795 transaction] effective to pass valid title." Counties' Br. at 43. Isolated metes and bounds phrases *drafted by the State of New York* in the *subsequent* treaties, however, "indicate" neither congressional awareness nor approval of the illegal 1795 transaction. The language in Congress' ratification of the 1798 or 1802 Treaties makes no mention of the 1795 agreement or of the

a consequence of this flaw in their syllogism, petitioners are forced to rest their argument on the "surrounding circumstances." Aside from being irrelevant to the issue of extinguishment, these historical events are at most ambiguous and essentially consistent with the finding of the court below that Congress, in ratifying the 1798 and 1802 treaties, was unaware of the reference in the metes and bounds descriptions to the void 1795 transaction.[18]

Stripped of its judicial facade, petitioners' argument is nothing more than an appeal to expediency. In essence, their argument comes to this: Because some federal and state officials may have believed, through the years, that the lands in question passed out of Indian ownership, the State of New York should be allowed to keep the benefit of its admittedly unlawful act. Petitioners are asking the Court to abandon long-settled and fundamental doctrines evolved for the protection of Indian property rights and to find "implicit" subsequent ratification of a void treaty.

Congress has determined that the protection of Indian property rights found in the Trade and Intercourse Act still is necessary. This congressional decision should not be undermined by the adoption of the Counties' mis-

illegality of the agreement. As stated by this Court in *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 351 (1945), "[t]he meaning of the word or phrase depends upon its use. In these treaties it seems clearly to designate the boundaries . . . but that falls short of acknowledgement . . . by the United States."

[18] The Counties rely on several factors supposedly evidencing congressional intent. The Counties refer to the attempts of federal agents to prevent the 1795 treaty before it was made. The acts of these agents in 1795 do not translate into congressional knowledge in 1798 and 1802 that the metes and bounds descriptions in the subsequent treaties referred to the 1795 transactions. The Counties also argue that Congress would have sanctioned "nonsensically circumscribed tracts of land", Counties' Br. at 43, if the language in the 1798 and 1802 treaties referred to the 1795 treaty calls. While Congress may have thought the tracts abutted *some* earlier purchase, this would not necessarily have been the 1795 transaction.

chievous and illogical "ratification" test. Approval of the petitioners' plea would be a shocking and unwarranted departure from the basic principles of Indian law that serve today as essential protection for Indian reservation lands.

CONCLUSION

The basic thrust of petitioners' argument is their bald assertion that affirmance of the holding below will result in social upheaval—the invalidation of titles to millions of acres and, *inter alia*, the eviction of thousands of innocent homeowners. The modest prayer of the Oneida Nation in this case and the moderate settlements already accepted by other eastern Indian tribes belie this wholly unjustified charge. Moreover, should a tribe in the future prove unreasonable in its demands, the courts can tailor their equitable relief to modern reality and, of course, Congress still claims the ultimate power of ratifying today in plain and unambiguous language a land transaction otherwise in violation of 25 U.S.C. § 177.

Past precedents of this Court and the manifest intent of Congress are contrary to the petitioners' position. Their scare tactics in the face of such adversity are unwarranted and inappropriate. The decision of the Court of Appeals should be sustained.

Respectfully submitted,

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